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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

HARRY M. KATZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD M. WALLER, JR., ESQUIRE of
FOWLER, WHITE, GILLEN, HUMKEY,
KINNEY AND BOGGS, P.A.
Post Office Box 1438
Tampa, Florida 33601
Counsel for Petitioner

Of Counsel:
MICHAEL L. KINNEY, ESQUIRE
LOUIS J. WILLIAMS, ESQUIRE
Post Office Box 1438
Tampa, Florida 33601

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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The Petitioner, HARRY M. KATZ, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on February 23, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which is not yet reported, appears in the Appendix appended hereto at pages A1-A5.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 23, 1972. A timely Petition for Rehearing was denied on March 17, 1972, and this Petition for Certiorari was filed within 30 days of that date. The judgment of the United States Court of Appeals for the Fifth Circuit appears in the Appendix appended hereto at pages A5-A6. The Order Denying Petition for Rehearing appears in said Appendix at page A6. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, IN VIEW OF THE COMPLETE LACK OF NOTICE TO PETITIONER THAT HIS CONDUCT COULD BE CONSIDERED UNLAWFUL AND IN VIEW OF THE COMPLETE LACK OF EVIDENCE THAT PETITIONER KNOWINGLY ACTED ILLEGALLY, THE CONVICTION OF PETITIONER FOR CONDUCT STRICTLY IN ACCORD WITH ACCEPTED MEDICAL PRACTICE IS A VIOLATION OF DUE PROCESS OF LAW.

II

WHETHER THE FIFTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL EVIDENCE TEST WITHOUT REGARD TO THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment 5: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

18 U.S.C.A. §1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

42 U.S.C.A. §408(c):

"Whoever . . . at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this chapter; . . . shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Fifth Circuit affirming the conviction of Petitioner HARRY M. KATZ for violation of 18 U.S.C.A. §1001 and 42 U.S.C.A. §408(c).

Petitioner HARRY M. KATZ is a medical doctor who was convicted and sentenced to two years imprisonment on the basis of a jury verdict finding him guilty on five counts of an indictment, two of which charged him with the felony of knowingly filing false statements in violation of 18 U.S.C.A. §1001 and three counts of which charged him with the misdemeanor of filing false statements in violation of 42 U.S.C.A. §408(c). The original indictment contained 12 counts against Petitioner. Prior to commencement of the trial before the United States District Court, the United States Attorney moved to dismiss three of the counts against Petitioner and at the close of the Government's case the District Court granted Petitioner's Motion for Judgment of Acquittal as to two additional counts. Thus seven counts of the indictment against Petitioner were submitted to the jury. Count I of the indictment charged a conspiracy against Petitioner and other members of the staff of Pinellas General Hospital in Largo, Florida, for the purpose of falsifying and misrepresenting claims to the Social Security Administration for services allegedly rendered to Medicare patients. The jury acquitted Petitioner of this conspiracy charge.

The remaining six counts against Petitioner all charge that Dr. Katz filed claims with the Social Security Administration for "hospital visits" which were not made. The jury found Dr. Katz innocent on one of the six counts and guilty on the five remaining counts. The conviction

of Dr. Katz thus relates solely to the question of whether or not he knowingly made false statements in connection with the hospital visits for which he claimed payment. Although the original indictment charged that he made false statements and participated in a conspiracy which defrauded the Government in an amount in excess of $200,000, the counts on which the jury convicted Dr. Katz represent a total of only approximately $880.

During his opening statement to the jury, counsel for the Government conceded that "Dr. Katz did make rounds" but argued that Dr. Katz did not make "meaningful hospital visits . . . beyond a 'Hi. How are you.'" At that point, counsel for Dr. Katz objected that the indictment did not charge any failure to make "meaningful visits" but only charged a failure to make "visits."

During the trial, the Government produced several witnesses to testify with respect to whether or not Dr. Katz made meaningful visits to the five patients named in the five counts of which Dr. Katz was convicted. These witnesses included some of the patients themselves and relatives or friends of the patients who visited the patients in the hospital. Generally, the patients testified that they did not remember seeing Dr. Katz on each and every day for which a visit was charged. The friends and relatives, for the most part, testified that during their visits to the patients they did not see Dr. Katz. Both the patients and the relatives and visitors testified that Dr. Katz often simply came by and said "Hello" and "How are you" and did not actually examine the patients.

The Government also produced as witnesses five members of the staff at the hospital. One of these witnesses, a nurse, testified that, in making his rounds, Dr. Katz would speak to each patient and ask them how they were and if they needed anything. Two other nurses testified

that Dr. Katz visited each patient every day on which they worked at the hospital. Another one of these witnesses testified that Dr. Katz made his rounds of every patient at least two out of three nights each week when she was on duty. The fifth witness, a doctor, testified merely that during the hours he was at the hospital he did not see Dr. Katz make rounds.

At the close of the Government's case, counsel for Dr. Katz moved the court for a judgment of acquittal and pointed out to the court that the Government had produced for the jury absolutely no standard as to what constitutes a "hospital visit."

The defense produced another member of the hospital staff who testified that Dr. Katz saw his patients every night and that she accompanied him almost every night. Other defense witnesses testiifed that Dr. Katz usually made his rounds at night and that they did not remember Dr. Katz taking any vacation whatsoever during the period of time covered by the indictment. Dr. Katz himself testified that he often made his rounds twice each day.

The defense also produced a hospital administrator from another hospital in St. Petersburg, Florida, who testified that a hospital visit by a doctor may simply be just to say "Hello, how are you feeling today." The witness testified that the question of time is not always important as to whether or not a visit constitutes a hospital visit. This testimony from this witness was the only evidence during the entire four-week trial on the question of what constitutes a hospital visit.

Nevertheless, during his closing argument, counsel for the Government again argued to the jury that there is a distinction between "rounds" and "a meaningful hospital visit."

Subsequent to the trial, counsel for Dr. Katz filed a Motion for New Trial, which was denied by the district court without allowing a hearing on said Motion.

The judgment of conviction was appealed to the United States Court of Appeals for the Fifth Circuit and that court assigned the case to its summary docket and, in spite of a special request for oral argument, affirmed the judgment of conviction without allowing any such argument. A timely Petition for Rehearing was filed in that court again requesting an opportunity for oral argument and said Petition was denied without allowing any such argument.

REASONS FOR GRANTING THE WRIT

I

Dr. Katz was convicted and sentenced to two years in prison for "knowingly and willfully" making false statements in claims for payment for medical services. The claims for payment were for "hospital visits" made by Dr. Katz to his patients. The counsel for the Government argued to the jury, both in his opening statement and in his closing argument, that Dr. Katz did not really make "meaningful hospital visits" but instead made only "rounds." The trial court did not instruct the jury on the issue of what constitutes a "hospital visit."

The only evidence in the whole case on the question of what constitutes a "hospital visit" was the testimony of a hospital administrator produced by the defense. This witness testified unequivocally that a "hospital visit" by a doctor can be just to say "Hello, how are you feeling today." The witness explained that a "hospital visit" occurs when the doctor "goes to see the patient in his room with the chart and visits with the patient." The witness stated specifically that the question of time is not important in determining whether or not a visit has occurred.

In spite of this uncontradicted evidence, the Government counsel attempted, and with apparent success, to persuade the jury that Dr. Katz' "rounds" did not constitute "meaningful hospital visits." In other words, even though the uncontradicted evidence indicates that Dr. Katz' practice of making rounds was strictly in accord with accepted medical practice, the Government counsel converted this practice into criminal conduct.

Clearly, a conviction thus achieved cannot withstand the application of principles of due process. This Court has very recently recognized that "all [persons] are entitled to be informed as to what the State commands or forbids." The law must give fair notice of offending conduct. *Papachristou* v. *City of Jacksonville*, 92 S.Ct. 839, 843 (1972). Although, in that decision, this Court decided that a statute was unconstitutionally vague and although the applicable statute in the instant case may not be subject to that attack, the special definition given by the Government to the term "hospital visit" causes the instant conviction to be subject to the same deficiency denounced by this Court in *Papachristou* v. *City of Jacksonville, supra.*

How was Dr. Katz supposed to have known that by making rounds and filing claims for payment for such rounds he would find himself convicted of "knowingly and willfully" making false statements? Can it be seriously contended that Dr. Katz had fair notice that his rounds might not be considered hospital visits and might lead to his conviction?

Furthermore, there is absolutely no evidence in this case that Dr. Katz "knowingly" made false or fraudulent statements in connection with the hospital visits. The statute under which Dr. Katz has here been convicted, 18 U.S.C.A. §1001, requires knowledge of the falsity or faudulent nature of the statements. This Court has

adopted the Model Penal Code definition of "knowingly." *Leary* v. *United States,* 395 U.S. 6, 46, n. 93, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

In a recent case involving a statute similar to the statute in the instant case, the Second Circuit Court of Appeals has applied the definition thus adopted by this Court. See *United States* v. *Squires,* 440 F.2d 859 (2d Cir. 1971). In the *Squires* case, the defendant was convicted of "knowingly" making a false statement in connection with the acquisition of a firearm. In reversing the conviction, the Second Circuit held that for the jury to convict the defendant it was necessary for the jury to find either that the defendant was "aware of a high probability" that the statutes prohibited him from receiving a firearm or that he deliberately avoided reading the Firearms' Transaction form and that, if he had read the form, he would have been "aware of a high probability" that he was prohibited by the statutes from receiving the firearm.

As applied to the instant case, the principles stated by the Second Circuit would allow a conviction of Dr. Katz only if the Government had proved that Dr. Katz was "aware of a high probability" that his "rounds" were not "hospital visits." However, the most thorough examination possible of all the evidence in this case would yield absolutly no suggestion that Dr. Katz had any awareness whatsoever that his rounds might not be considered hospital visits. Under these circumstances, the verdict of the jury based upon the specious distinction created by the prosecuting attorney and the conviction based on that verdict cannot be reconciled with fundamental principles of due process.

II

It is fundamental that in a criminal case the Government must prove every element of the offense beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 137 (1955); *American Tobacco Company* v. *United States*, 328 U.S. 781, 66 S.Ct. 1125 (1946). In the instant case, however, the Fifth Circuit reviewed the evidence and has applied a substantial evidence test wihout regard to the requirement of proof beyond a reasonable doubt, just as if this case were a civil case. In its opinion, the Fifth Circuit has introduced its evidentiary comments by noting the substantial evidence test and then, following its cursory statement of the evidence, the Fifth Circuit has stated (A5):[1]

> "In sum, this evidence was sufficient to make a question for the jury as to each count."

Of course, it cannot be proved conclusively from the brief opinion of the Fifth Circuit that the court applied the substantial evidence test without regard to the principle of proof beyond a reasonable doubt. However, the opinion itself does not even purport to have been concerned with proof beyond a reasonable doubt. Moreover, the whole framework of the opinion suggests a review of the evidence adduced in a civil case. The court describes certain of the Government's evidence and then states that the defensive evidence was "to the contrary." The court makes no attempt to determine if the Government's evidence meets any standard beyond that required in a civil case. The court seems wholly satisfied once it establishes that there might be conflicting evidence regardless of the quality of the Government's evidence.

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1. "(A)" refers to Appendix appended hereto.

The real proof, however, that the Fifth Circuit had no concern for the requirement of proof beyond a reasonable doubt lies in an analysis of the evidence as a whole. The evidence in support of the Government's contentions is *negative, circumstantial* evidence such as the testimony of the hospital patients who could have been sleeping or under medication and who could not be expected to remember the rounds made by Dr. Katz. The contrary evidence produced by the Government and by the defense consisted of witnesses who *affirmatively* and *directly* testified that Dr. Katz in fact made the rounds. The Government produced absolutely no direct, affirmative evidence that Dr. Katz was somewhere other than in the hospital on the days in question.

No one who is familiar with the evidence in this case can reasonably argue that the Fifth Circuit went beyond its initial determination that a conflict in the evidence might exist. The Ninth Circuit Court of Appeals, in *United States* v. *Nelson*, 419 F.2d 1237, 1242 (9th Cir. 1969), has recognized this practice of some circuit courts of applying the substantial evidence test in criminal as well as civil cases. The Ninth Circuit has concluded that the decisions of this Court require application of a different test from the substantial evidence test namely, a test "reflecting the burden of establishing guilt beyond a reasonable doubt."

The failure of the Fifth Circuit in the instant case to require proof beyond a reasonable doubt conflicts not only with the decision of the Ninth Circuit in *United States* v. *Nelson, supra*, but also with the decision of the Eighth Circuit in *United States* v. *Jones*, 418 F.2d 818 (8th Cir. 1969), the decisions of the Tenth Circuit in *Pauldino* v. *United States*, 379 F.2d 170 (10th Cir. 1967), and in *United States* v. *Wright*, 450 F.2d 992 (10th Cir. 1971), and the

decision of the Seventh Circuit in *United States* v. *Delay*, 440 F.2d 566 (7th Cir. 1971). In each of these decisions, the respective court of appeals went beyond the substantial evidence test to determine if the evidence in favor of the Government was sufficient to prove guilt beyond a reasonable doubt. It is this extra step which is so crucial in appellate review of criminal cases; yet it is this step which the Fifth Circuit has omitted in the instant case.

We respectfully submit that the decision of the Fifth Circuit necessarily conflicts with the decisions of the other circuits and with the decisions of this Court cited hereinabove. We further submit that the equal and uniform administration of criminal justice throughout our federal system cannot exist so long as the decision of the Fifth Circuit in this case goes uncorrected.

CONCLUSION

The decision of the Fifth Circuit affirming the conviction of Dr. Katz allows the Government's counsel to convert into a crime that which is and has been an accepted medical practice. Without prior notice or reason to suspect, Dr. Katz now finds that his conduct was unlawful and, as a result, he faces two years imprisonment. Such a deprivation of liberty without due process of law is and must remain inconsistent with basic principles of criminal justice.

The most fundamental difference between criminal and civil cases under our system of jurisprudence is the burden of proof required in criminal cases. The Government must prove that the accused is guilty beyond a reasonable doubt. In this case, the Government fails to meet its burden; and the Fifth Circuit's application of the substantial evidence test regardless of this failure necessarily conflicts with applicable decisions of this Court and other circuit courts.

We submit that individual freedom is too precious a right to be lost in this fashion.

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

EDWARD M. WALLER, JR., ESQUIRE of
FOWLER, WHITE, GILLEN, HUMKEY,
KINNEY AND BOGGS, P.A.
Post Office Box 1438
Tampa, Florida 33601
Counsel for Petitioner

Of Counsel:
MICHAEL L. KINNEY, ESQUIRE
LOUIS J. WILLIAMS, ESQUIRE
Post Office Box 1438
Tampa, Florida 33601